

FEBRUARY 15, 2005

CLAYTON HEE

STATE SENATOR, 43RD DISTRICT

FLOOR SPEECH ON RICHARD BISSEN'S NOMINATION

Mr. President I rise to vote no. And let me state at the onset I am not under any grand illusion that this nominee will not be confirmed by an overwhelming majority. That is not my point. It has never been my point.

Unlike others I have not taken any straw votes nor have I asked anyone to join me in voting no. To do so would trivialize the seriousness of our job of consenting to a judicial nominee. To do so would place this nominee as an object as opposed to a person who has worked exceedingly hard to earn the confidence of the Governor and the opportunity to be evaluated by the Senate. To do so would place winning above all else. This nominee does not deserve that kind of invidious treatment.

My friends the Hawaii State Constitution demands us as Senators to consent to judicial nominees. It is our duty to do so. It is the single biggest difference between our colleagues in the House of Representatives and us.

The late Charles L. Black Jr. in a published article in the Yale law Journal in 1970 spoke about the serious differences between the confirmation process between Cabinet officers and Judges. Using the federal system as the example Black said that after arguing that a Senator should let the President have wide latitude in filling executive branch posts he said that "Just the reverse, just exactly the reverse, is true of the judiciary. The judges are not the President's people. God forbid! They are not to work with him or for him. They are to be as independent of him as they are of the Senate, neither more nor less."

As numerous legal scholars have shown, it is the judicial nominee that carries the burden of convincing the Senate that they should be confirmed, and doubts should be resolved in favor of protecting the public. Law Professor Chemerinsky wrote, "Under the Constitution there is no reason why a President's nominees for (the) Supreme Court are entitled to any presumption of confirmation. The constitution simply says that the President shall appoint federal court judges with the advice and consent of the Senate. The Senate is fully entitled to begin with a presumption against the nominee and confirm only if persuaded that the individual is worthy of a lifelong seat on the Supreme Court."

Some say this is the toughest job of being a Senator. And in some ways it can be. It should come as no surprise that many of us have been lobbied to vote one-way or the other regarding the nominee.

But really friends for many of us this confirmation is easy. Some of you will vote for this nominee because like the Governor who made the appointment, you are a Republican. That's easy. There are others who will vote for this nominee primarily because like the nominee you are from the island of Maui. That's easy too. Then there are some who will vote for this nominee because you have developed political friendships since your

election or you see this as an opportunity to do just that. Even that's easy although less transparent.

Several of you may justify your vote for the nominee by the Hawaii Bar Association's "qualified" rating or the Judicial Selection Commission's recommendation regardless that you haven't a clue how the mysticism of the either shrouded rating system operates. But even that is easy because you can lay off your constitutional responsibility to some other organization's dereliction.

We know it is true that both organizations discussed the nominee's first admonishment of Prosecutorial Misconduct, which resulted in a reversal of a lower court verdict in a case dated August 5, 1996. This case is known as *State v. Sanchez*. But what is also true and more important for our purposes is that the nominee failed to disclose the Sanchez case in both his 2002 and 2004 judicial applications to both organizations in writing. And but for a single solo practitioner Maui lawyer who brought the case to the Chair of the Judiciary Committee no one would have known about it. To prove the point, and to my disappointment, only when asked, did the nominee disclose to us the Sanchez case.

The Senate would never have known about Sanchez because it was never volunteered to us. Ever.

The sad fact of the matter is it is also true that both the Judicial Selection Commission and the Hawaii Bar Association to this very moment are evidently unaware of a second written admonishment of the nominee. Why is this and how could this happen? Because as far as the Judiciary Committee can conclude, the nominee never disclosed the second admonishment to either organization verbally or in writing.

And how do we know that? Question 5 on page 16 of the nominee's 2004 application asks, "Has your behavior or conduct ever been criticized or have you been admonished in a written decision by any court?" The nominee's answer is, "Not that I can recall."

This second case is known as *State v. Schmidt*, dated January 17, 1997. The Intermediate Court of Appeals in its written decision admonished and criticized the nominee for improper behavior in his statements involving a shoplifting case. Again, had it not been for one single lawyer familiar with the case coming forward the Senate would not have known about this second admonishment. When asked about the case five days ago on February 10th he said, "I don't recall."

The Sanchez opinion was written on August 5, 1996. The Schmidt opinion was written on January 17, 1997. Both opinions were written by Supreme Court Justice Simeon Acoba who at that time was a judge of the Intermediate Court of Appeals and both opinions were concurred by a unanimous vote of the other judges who preside on the Intermediate Court of Appeals. The fact remains that the nominee should have disclosed both admonishments in both his applications in 2002 and 2004.

What I find most troubling is that even after explaining to the Committee that he should have disclosed Sanchez to us the nominee could not recall Schmidt. That, for me, is problematic. Only after being informed about Schmidt did he agree that Schmidt should also have been disclosed to us as well. To this extent I agree with Judiciary Chair Senator Colleen Hanabusa that this speaks to the elements of character and integrity.

Mr. President and colleagues every lawyer and judge that I have spoken to has said to me that it is very difficult to understand how someone could forget a written court admonishment, sanction or other violation. In fact, to a person, every lawyer and judge has said that it is precisely those criticisms that are most often remembered as opposed to victories and wins.

Such criticisms are personal. They strike to the heart of one's professional conduct as improper and unacceptable.

The nominee's apparent inability to remember these cases is baffling to me and suggests to me that either the nominee has difficulty recalling serious admonishments or that there may have been a belief the Senate would never find out.

Prosecutorial Misconduct is a serious offense. It often times indicates a zeal to convict at any cost rather than following long standing rules of court governing a Prosecutor's ethical conduct to assure a fair trial for the accused. It is so serious that less than one half of one percent of all cases brought to the courts by Attorneys General, County Prosecutors and Federal Prosecutors end up in situations where an appellate court opines that the Prosecutor's behavior was so improper and that the defendant was denied a fair trial. Some cases like Sanchez are even rarer because in this case the appellate court actually reversed the decision of the lower court.

Canon number 1 of the Code of Judicial Conduct says in part, "An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. Some of you may argue that he is not yet a judge and therefore should not be held to that standard.

The Preamble of the Code of Professional Responsibility of the Hawaii Court Rules says in part, "Lawyers, as guardians of the law, play a vital role in the preservation of society. A consequent obligation of lawyers is to maintain the highest standards of ethical conduct. Not every situation which he may encounter can be foreseen, but fundamental ethical principles are always present to guide him."

Mr. President and colleagues it was reported by both newspapers that the Administrator of the State Water Commission resigned last week for refusing to support legislation she believes would kill the agency that environmentalists see as a guardian against overdevelopment. Her name is Yvonne Izu. She is a lawyer and a former deputy Attorney General. Ms. Izu said in part, "I didn't feel it was fair to ask the Water

Commission staff to prepare testimony that would dismantle the agency that they work for.

Regardless of whether you agree or not with Ms. Izu we should all agree that she stood up for her principles. She relied on her belief in fairness to guide her in her decision.

She stood up for the commission upon which she was hired to represent. She stood up for her employees against the State Department. She stood up for the people of Hawaii against legislation supported by the Governor.

She held that accountability to her job and the people of Hawaii was more important to her than keeping her job. She did her job. She followed her ethical principles. She followed her heart. And she stands alone.

Too often we make the mistake placing a priority of trying to keep our job over doing our job. My friends there are others here who can tell you that we merely occupy these seats. None of us will be here forever. Not a single one of us. And these are the times when we are called upon to do our jobs.

Ask Yvonne Izu.

Some of you like me may have received veiled threats and unfair criticism because of uncompromising beliefs held by some that we need a "Hawaiian" on the court or that the nominee is really a popular "Maui Boy" or that what we don't need is another Aama crab in the bucket holding a Hawaiian down because of "one minor incident". And who can blame this Maui critic; after all, his conclusions are primarily based on the 3-second sound byte that ran on the Channel 2 news.

And he is not alone. A former Supreme Court Justice has weighed in on this matter. He is joined by former judges as well as lawyers as well as friends and family. Four labor leaders that I know have weighed in on the discussion. But they certainly don't know what has been presented to the Senate.

And there have been others who have also appealed to us to deny confirmation. Like the other side they have shared their opinions on the fitness of this individual to stand in judgment over one's property and one's liberty. And like the other side they certainly don't know what has been presented to the Senate in its totality.

Difficulty is merely a part of this process. Difficulty isn't convenient. It isn't easy. It wasn't meant to be easy. It will never be easy. Ask Yvonne Izu.

Let me conclude by noting that in last Saturday's Honolulu Advertiser the nominee said in part that he felt "vindicated" and that he answered the questions "straight up." Moreover, he said he didn't understand why reservations still remained.

Here's why I voted "with reservations" last Friday. Throughout the difficult process I have tried to give the nominee the benefit of the doubt. If nothing else he has always availed himself to discuss his nomination.

Unlike others, this nominee never once said he wouldn't be available. In fact, we have each other's cell phone numbers.

In our initial office interview which lasted ninety minutes or so he was exceedingly pleasant and open. Frankly, I enjoyed our conversation. One of the last questions I asked was, "Is there anything you think I should know that I haven't asked?" His answer was "no Senator."

After the first Judiciary hearing where the Sanchez case was discovered I met with Justice Acoba who wrote the Sanchez opinion for approximately 45 minutes. He came to my office here at the State Capitol.

I then met with Attorney General Bennett and Prosecutor Carlisle for approximately one hour and following that meeting I met with the nominee for approximately additional two hours. Each explained their views on the Sanchez case. No one, not one, brought up the Schmidt case. This much is certain, Justice Acoba knew about the Schmidt case because he was its author and the nominee knew about the case because he prosecuted the case.

Schmidt was brought to me after I met with all of these people. Only then did doubt and questions of credibility arise, after all, as I stated earlier I believe it is prudent to give someone the benefit of the doubt.

That the nominee feels "vindicated" and that he cannot understand why reservations still exist demonstrates to me an inability to fully appreciate the seriousness and gravity of the confirmation proceedings.

I understand there are several of you who will cast your support "with reservations" as opposed to "straight up." That suggests that you continue to have some doubt about the fitness of this nominee to sit in judgment over others accused of crimes including rape, assault and murder.

My friends no person has an entitlement to a seat on the Circuit Court, and if a nominee cannot clearly satisfy the Senate without any reservations whatsoever that he or she meets all the criteria for confirmation, the people of Hawaii should not be asked to bear the risk of entrusting that individual with the reins of judicial power.

US Senator Robert Byrd said in a debate over the elevation of Justice Rehnquist to Chief Justice, "The benefit of any doubt should be resolved in favor of the people of the United States." If there is a cloud of doubt, this is the last chance . . . if there is a doubt, I say resolve it in the interest of our country and its future, and in the interest of the Court."

Senator Byrd is right. This is the last chance. Once the nominee is confirmed ten years will pass before any evaluation by the people will occur. Because the cloud of doubt still remains on this nominee's courtroom indiscretions, the court's admonishments in two separate cases and the nominee's inability to recall and voluntarily disclose the admonishments candidly to the State Senate of Hawaii it is with great regret I shall vote no.

Thank you Mr. President.